FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-25
77-37
77-42

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,
Petitioner,

against

SHIRLEY HERRIOT BROOKS and GLORIA JONES, et al.,
Respondents.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,
Petitioners,

against

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,
Respondents.

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,
Petitioners,

against

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER LOUIS J. LEFKOWITZ

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Intervenor-Petitioner
Pursuant to Executive Law §71
Pro Se
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3396

SAMUEL A. HANKOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Statement	2
I. Answering Respondents' Brief	2
II. If, contrary to our suggestion, this Court accepts the *amici* briefs this Court will find no additional support in such briefs for the decision of the court below	5
Conclusion	10

Table of Authorities

Cases:

Anastasia v. *Cosmopolitan Nat. Bank*, 527 F. 2d 150 (7th Cir. 1975)	3
Blye v. *Globe-Wernicke Realty Co.*, 33 NY 2d 15, 347 N.Y.S. 2d 170, (1973)	3, 6
Boddie v. *Connecticut*, 401 U.S. 371 (1971)	4
Bond v. *Dentzer*, 494 F. 2d 302 (2d Cir. 1974), cert. den. 416 U.S. 837	8
Cox Bakeries of North Dakota, Inc. v. *Timm Moving & Storage, Inc.*, 554 F. 2d 356 (8th Cir. 1977)	3, 4
Davis v. *Richmond*, 512 F. 2d 201 (1st Cir. 1975)	3
D. H. Overmyer Co. v. *Frick Co.*, 405 U.S. 174 (1972)	4
Dininny v. *Reavis*, 100 Misc. 316 (Sup. Ct., N. Y. Co. 1915), aff'd 178 App. Div. 922, 65 N.Y.S. 97	2, 5, 6, 8
Hackett v. *Nelson Express & Storage Co.*, 162 Misc. 444, 294 N.Y.S. 905 (Sup. Ct., N. Y. Co. 1937)	5

PAGE

Hernandez v. *European Auto Collision, Inc.*, 487 F. 2d 378 (2d Cir. 1973) 6

I.D.S. Leasing Corp. v. *Hansa Jet Corp.*, 82 Misc. 2d 741, 369 N.Y.S. 2d 922, aff'd 51 AD 2d 536 (2d Dept. 1976) 3

Jones v. *Banner Moving & Storage, Inc.*, 48 AD 2d 928, 369 N.Y.S. 2d 804 (2d Dept. 1975) 8

Lefcourt v. *Legal Aid Society*, 445 F. 2d 1150 (2d Cir. 1971) 5

Lindsey v. *Normet*, 405 U.S. 56 (1972) 8

Magro v. *Lentini Bros. Moving & Storage*, 338 F. Supp. 468 (E.D.N.Y. 1971) aff'd 460 F. 2d 1064 (2d Cir. 1972), cert. den. 406 U.S. 961 (1972) ..4, 5, 6, 8

Matter of Pooler v. *Public Service Commission*, 58 AD 2d 940 (3d Dept. 1977), affd. —— NY 2d —— (December 14, 1977) 7

Matter of Smiley, 36 NY 2d 433, 330 N.E. 2d 53, 369 N.Y.S. 2d 87 (1975) 9

Melara v. *Kennedy*, 541 F. 2d 862 (9th Cir. 1976) ... 4

Parks v. *"Mr. Ford,"* 556 F. 2d 132 (3rd Cir. 1977) .. 3

San Antonio Ind. School Dist. v. *Rodriquez*, 411 U.S. 1 (1973) 8

Sharrock v. *Dell Buick-Cadillac*, 56 A D 2d 446, 393 N.Y.S. 2d 166 (2d Dept. 1977) 3

Town of Black Brook v. *State*, 41 NY 2d 486 (1977) 9

United States v. *Kras*, 409 U.S. 434 (1973) 4

United States v. *Wiseman*, 445 F. 2d 792 (2d Cir. 1971); cert. den. 404 U.S. 967 9

Wallace v. *Kern*, 481 F. 2d 621 (2d Cir. 1973), cert. den. 414 U.S. 1135 (1974) 5

PAGE

Weinstein v. *Santini Transfer Co., Inc.*, 155 Misc. 139, 278 N.Y.S. 388 (City Ct., Bronx Co., 1935) 6, 7

Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) .. 8

STATUTES

U.C.C. (N.Y.) § 7-209 2

§ 7-210 .....2, 5, 8, 9

N. Y. Executive Law § 63(12) 6

N. Y. General Business Law, § 349 6

N.Y.C. Administrative Code 2203 (d2.0) 7

MISCELLANEOUS

61 Cornell Law Rev. 587 (*Evolving Concept of the Innkeeper's Lien*) (1976) 3

IN THE

Supreme Court of the United States

No. 77-25
77-37
77-42

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioner,

against

SHIRLEY HERRIOT BROOKS and GLORIA JONES, et al.,

Respondents.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

against

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Respondents.

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Petitioners,

against

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER LOUIS J. LEFKOWITZ

Statement

This reply brief is submitted in response to the brief for respondents and to the several motions to file *amicus curiae* briefs in support of respondents.

I. Answering Respondents' Brief:

Starting at p. 3 of their brief, Respondents make reference to what Judge Holden below in dissent, 553 F. 2d at 775 *et seq.* called an ". . . unfortunate plight . . . [which] inspires concern". The relevant statute, U.C.C. § 7-210, however, was not the cause. Rather § 7-209 (the warehouseman's retaining lien), not at issue or under challenge now, was the reason. Detention, not sale which never occurred, caused the alleged hardship.

The statement on p. 9, ftn.**, "that the parties stipulated to the propriety of the class action . . ." is misleading. The Attorney General is a party here, in the Court of Appeals and the District Court, as is the American Warehouseman's Association and the International Association of Refrigerated Warehouses, Inc., as well as the Warehouseman's Association of New York and New Jersey, Inc., and the Cold Storage Warehousemen's Association of the Port of New York. None of the above stipulated to a class action. This "stipulation" and misleading statement is repeated (p. 10) in "Proceedings Below".

In response to Summary of Argument, New York has *not* delegated to warehousemen the function of dispute resolution, contrary to respondent's contentions. The dispute can continue after sale and the usual processes of court adjudication can take place. See *Dininny* v. *Reavis,* 100 Misc. 316 (Sup. Ct., N.Y. Co. 1915), aff'd 178 App. Div. 922, 65 N.Y.S. 97. Any conclusion of state action (Br., p. 13) is not controlled by the factors respondents cite.

Basically respondents rely on racial discrimination cases which have little, if no application, to the instant case.

Racial discrimination is at the heart of the Fourteenth Amendment; debtor-creditor relations are not.

In response to the "Argument" based on assistance of "governmental functionaries" (Br., p. 16), is that there is no such assistance, minor or otherwise. The concurrence in *Parks* v. *"Mr. Ford"*, 556 F. 2d 132, 148 (3rd Cir. 1977) really was a dissent there. *Id.* at 143-144. The presence of governmental assistance eliminated the state action issue in the *Sniadach* (395 U.S. 337 [1969]) line of cases.

The section under discussion serves to limit rather than create the enforcement of the warehousemen's lien. *Blye* v. *Globe-Wernicke Realty Co.,* 33 N Y 2d 15, 347 N.Y.S. 2d 170 (1973), is not relevant since it dealt with the initial imposition of the innkeeper's lien, a non-possessory general lien. Moreover *Blye* relied on the compulsion which it felt existed in this Court's decisions involving racial discrimination and federal decisions invalidating innkeeper's liens by several district courts. More recently, however, no state action was found in such liens by higher federal courts. See e.g., *Davis* v. *Richmond,* 512 F.2d 201 (1st Cir. 1975); *Anastasia* v. *Cosmopolitan Nat. Bank,* 527 F.2d 150 (7th Cir. 1975), cert. den. 424 U.S. 928. See discussion of *Blye* in 61 Cornell Law Rev. 587, 590, 591, 596, 616-17 (*Evolving Concepts of the Innkeeper's Lien*) (1976).*

Respondents rely extensively (Br., pp. 13, 17, 22, 25, 26) on *Cox Bakeries of North Dakota, Inc.* v. *Timm Moving &*

---

* The question is again before the New York Court of Appeals in the appeal of *Sharrock* v. *Dell Buick-Cadillac,* 56 A D 2d 446, 393 N.Y.S. 2d 166 (2d Dept. 1977) in which we have cited *IDS Leasing Corp.* v. *Hansa Jet Corp.,* 82 Misc. 2d 741, 369 N.Y.S. 2d 922, affd. 51 A D 2d 536, 377 N.Y.S. 2d 639 (2d Dept. 1976), upholding the garageman's lien. Respondents are correct at p. 22, ftn. *, that all parties have submitted their briefs in *Sharrock.* However from prior experience this year and conversations with the Clerk of the Court of Appeals it is four (4) months or more from submission of briefs to oral argument. Respondent's brief in *Sharrock* was only filed in December, 1977. It will be April, 1978 before we even argue. Thus this Court should not defer.

Storage, Inc., 554 F. 2d 356 (8th Cir. 1977) which agrees with the decision below.* But note the ftn. on p. 11 of respondents' brief, where in effect they say they have no objection to excluding the commercial use of the warehouseman's lien sale from this case, restricting it to consumer transactions, eliminating *Cox Bakeries* from the case at hand. In this regard they agree with the decision below, 553 F.2d at 774-775 which almost directs the exclusion of commercial warehousing from the case, citing *D. H. Overmyer Co.* v. *Frick Co.,* 405 U.S. 174 (1972). In contrast to the instant case *Cox Bakeries, supra,* is a commercial situation, and thus even in the courts below's view sale "may be constitutionally unobjectionable." *Id.* at 774. On this basis *Cox Bakeries* is inapplicable here simply on respondents' representations and Brief for appellants, p. 45 in the court below.

Respondents' reliance (Br., pp. 26, 27) on *United States* v. *Kras,* 409 U.S. 434 (1973) is not helpful to them as this Court held in a case not having a state action question, that access to courts is not the only relief available to bankrupts and a discharge in bankruptcy is not a "fundamental" right. Thus a filing fee requirement for bankruptcy is not unconstitutional. It distinguished *Boddie* v. *Connecticut,* 401 U.S. 371 (1971) at 443 *et seq.* The instant case has certain similarities. It may cost money to litigate** but that is not dispostive. See *Magro* v. *Lentini Bros.*

---

* As such it is in direct conflict with *Melara* v. *Kennedy,* 541 F. 2d 862 (9th Cir., 1976). Respondents' attempt to distinguish *Melara,* Brief, p. 17, ftn., is misguided as well as incorrect. In so doing they disagree with the decision below, 553 F. 2d at 774, which states its holding is directly contrary to *Melara.* Furthermore *Melara* mentions the existence of a contract, but hardly relies on it. At 807-808 it rejected the delegation of state function theory. It came to this conclusion not based on a contract and only in the last sentence of "V" (at 808), says "further . . . Melara had notice . . . through the contract."

** It certainly has not cost the respondents any money. Their counsel provides free legal services.

Moving & Storage, 338 F. Supp. at 468, ftn. 9 (cited in our Main brief, p. 22). Since respondents had an attorney at all relevant times many courses were open to them, *Dininny* v. *Reavis, supra;* they were hardly restricted to a constitutional attack in federal court.

The attempt to downgrade *Hackett* v. *Nelson Express & Storage Co.* (Br. p. 31, ftn.), 162 Misc. 444, 446-447, 294 N.Y.S. 905, 909 (Sup. Ct., N.Y. Co. 1937) is strange. The decision called the statute on warehousemen's lien sales "wholesome". *Id.* at 447. It also explained itself (in holding for the warehouseman):

> "The defendant extended credit to the plaintiff over a period of months. Indeed, nothing was ever paid on the account. The defendant even paid out cash at the plaintiff's instance and request. There was a substantial compliance with the spirit of the statute; the purpose of the law was met. No fraud or collusion or bad faith is even hinted at. The conduct of the sale itself is not impugned. Only technicalities are relied on, technicalities which cost the plaintiff nothing."

Much of the Brief for Respondents otherwise concerns itself with the ultimate constitutionality of U.C.C. § 7-210, not at issue here, and is therefore not relevant here as we point out in our Main Brief, Point II.

II. If, contrary to our suggestion, this Court accepts the *amici* briefs this Court will find no additional support in such briefs for the decision of the court below.

A. *The Legal Aid Society*

The Legal Aid Society brief's effort to support the claim of state action here because of some asserted governmental interest is substantially weakened by its own successful contrary position in *Lefcourt* v. *Legal Aid Society,* 445 F. 2d 1150, 1155-56 (2d Cir. 1971); see also *Wallace* v. *Kern,* 481 F. 2d 621 (2d Cir. 1973), cert. den. 414 U.S. 1135 (1974).

This motion should be denied and the brief *amicus curiae* submitted should be disregarded for the reasons set forth *infra.*

The contention (Br. p. 7), without authority, that reversal of the Second Circuit "would mandate the withdrawal of all judicial involvement . . ." is not the case and is amply demonstrated by *Dininny* v. *Reavis, supra,* 100 Misc. 316, affd. 178 App. Div. 922, cited in our main Brief, pp. 18, 19, 21; *Magro* v. *Lentini Bros. Moving and Storage,* 388 F. Supp. 464, affd. 460 F. 2d 1064, *cert. den.* 406 U.S. 961, cited in our main Brief, pp. 20, 21, 22, and many other cases including *Weinstein* v. *Santini Transfer Co., Inc.,* 155 Misc. 139, 278 N.Y.S. 388 (City Ct., Bronx Co. 1935), cited by the proposed *amicus* and also assumes violation of due process, Br., p. 15, ftn. 7.

In footnote 2, p. 8 of the Society's brief it cites *Hernandez* v. *European Auto Collision, Inc.,* 487 F. 2d 378 (2d Cir. 1973) as a case where the Second Circuit found state action present, *cf.* p. 9 of Society brief (". . . implicitly found state action . . ."). It did not as shown in the decision below, 553 F. 2d at 774.

The Society's reliance on the *Blye* case, *supra,* Br. pp. 10, 11, 13 is particularly inappropriate. As we have pointed out, *Blye* only involved the hotel's imposition of a lien by seizing baggage, not the subsequent sale. See our Main brief, p. 11. In the case at hand, the possessory lien itself is not an issue. By not cross-petitioning for certiorari on the lien itself the respondents concede lack of state action here. *Cf.* 553 F. 2d, at 769, ftn. 10.

The reference by the Society to a 1976 newspaper article calling for expansion of regulation is not germane to the issue. Whatever further legislation may be desirable, there is at present jurisdictional authority in the State Attorney General (N.Y. Executive Law, § 63, subd. 12 and General Business Law, § 349) and in the New York City's

Consumer Protection Department (N.Y.C. Administrative Code 2203, d 2.0) for at least civil prosecution of any deceptive practices or unconscionability. During the course of the last two years no such legal action was instituted by the State Attorney General and we know of none by the City of New York. The Attorney General's Consumer Protection and Fraud Bureau has reported that it has successfully mediated any complaints respecting warehousemen, principally against two firms, arising mainly from misunderstandings about the signed agreement in which the customer acknowledges "receipt of this contract, the order for service contract and household goods bill of lading contract prior to start of service." The misunderstandings may be further avoided by the 1977 amendment, effective June 1, 1978 (L. 1977, Ch. 747) requiring all agreements to be "written in non-technical language and in a clear and coherent manner." The article is not concerned with the requirement for state action or due process protection. The position of the Attorney General has consistently been that such state action must be found before there is any discussion of the challenge to the lien or sale.

B. *New York State Consumer Protection Board*

Since that Board as other state agencies and officials has no statutory authority to appear in court in any capacity except through the State's Attorney General and the Board has been several times determined to be without any such authority (see the latest *Matter of Pooler* v. *Public Service Commission,* 58 A D 2d 940 [3d Dept. 1977], affd. —— N Y 2d —— [December 14, 1977]), it is the duty of the Attorney General to object to the filing of any brief, whether as *amicus* or otherwise, styled as being presented by the Board. Indeed it is doubtful that the brief presents the view of any one but the Executive Director of the Board.

The cases the Brief cites may be examples of moving company abuse but hardly are relevant to the issues of state action. *Weinstein* v. *Santini Transfer Co., Inc., supra,* obscure but also cited by the Legal Aid Society, is an action for conversion, demonstrating the adequacy of reme-

dies if the warehouseman abuses his right of sale. Main Brief, Point II. *Cf. Dininny* v. *Reavis, supra,* 100 Misc. at 317-318. Besides *Weinstein* cites no authority for the "matter of common knowledge" of abuses. *Jones* v. *Banner Moving & Storage, Inc.,* 48 A D 2d 928, 369 N.Y.S. 2d 804 (2d Dept. 1975) is technically a modification of the decision below but it completely reverses a declaration of unconstitutionality by the lower court.

We find it particularly strange that the Board brief, p. 7, cites *Magro* v. *Lentini Bros. Moving and Storage Co., supra,* 338 F. Supp. 464 (E.D.N.Y. 1971), affd. 460 F. 2d 1064 (2d Cir. 1972), cert. den. 406 U.S. 961 (1972). As the District Court there clearly held U.C.C. § 7-210 did not violate due process, assuming state action. This was in spite of the abuses of the warehouseman alleged. If they are irrelevant as to constitutionality, certainly those "abuses" are no better as to the question of state action.

The Board's assertion, Br., Point III, p. 8, *et seq.,* that affirmance of the court below will accommodate all interests is asking this Court to exercise a legislative judgment. Indeed the examples cited demonstrate that the New York Legislature remedies "abuses" when convinced of a particular statutory amendment.

The Board also alludes to *Bond* v. *Dentzer,* 494 F. 2d 302 (2d Cir. 1974), cert. den. 416 U.S. 837, p. 11 at ftn. 6 (also cited by the Legal Aid Society [Br., p. 8, ftn. 3]) where the Second Circuit found no state action but the Legislature amended the law. This despite the finding of absence of state action and consequently any declaration of unconstitutionality. Any greater state participation here, too, is for the Legislature. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 487-88 (1955); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1 (1973). It is not the function of the courts to remake the traditional practices of the enforcement of possessory liens as suggested in the various *amici* briefs. *Lindsey* v. *Normet,* 405 U.S. 56, 74-75 (1972).

C. *The City of New York*—This political subdivision of the State of New York has submitted an *amicus curiae* brief on the last day of its administration. This despite the fact that the New York Court of Appeals has held that a political subdivision has no standing to challenge constitutionality of a state law. *Town of Black Brook* v. *State,* 41 N Y 2d 486, 393 N.Y.S. 2d 946 (1977). More pertinently, the *amicus* expresses no interest in the constitutionality of U.C.C. § 7-210. It only states it has passed local laws protecting the consumer and is of course in a position to add thereto if deemed necessary.

United States v. *Wiseman,* 445 F. 2d 792 (2d Cir. 1971), cert. den. 404 U.S. 967, cited by the City is not relevant. This was a criminal prosecution of private process servers who executed false affidavits of service to obtain default judgments in state courts. It was held on the facts to be a "public function"—namely they caused the Clerk of the state Civil Court, a state official, to do a wrongful act. *Id.* at 794-5. Ftn. 2 at 795 states that licensing is relatively insignificant as to state action. Ftn. 3 notes the greater likelihood of finding state action where racial discrimination is involved. At 796, it notes that there is only a narrow class of cases involves a "public function". It called service of process essentially and traditionally a public function.* *Wiseman* strongy demonstrates that private conduct must have a significant public character to be held state action. None of this exists in the instant case.

The Brief, p. 5, alludes to recourse to a plenary action, if the party can afford this. While free legal services are not a right, they are widely available. *Matter of Smiley,* 36 N Y 2d 433, 441, 330 N.E.2d 53, 369 N.Y.S. 2d 87 (1975). This instant case is an example. See p. 4, ftn. ** *supra.*

---

* Although not mentioned, it may have been influenced by the fact that in federal court the U.S. Marshal serves summonses as a matter of regular course.

CONCLUSION

The order should be reversed and the complaint dismissed.

Dated: New York, New York
January 9, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
Of Counsel